

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROGER VIET,

No. C 09-4175 TEH (PR)

Petitioner,

v.

ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS; DENYING
CERTIFICATE OF APPEALABILITY

M. MARTEL, Warden,

Respondent.

_____ /

Pro se Petitioner Roger Viet seeks a writ of habeas corpus under 28 U.S.C. § 2254, which, for the reasons that follow, the Court denies.

I

In May 2007, Petitioner was sentenced to twenty-three years to life in state prison following his convictions for various sex crimes committed against his minor daughter. Doc. #6, Ex. A at 720. On March 23, 2009, the California Court of Appeal affirmed the judgment. Doc. #6, Ex. G at 1. On July 8, 2009, the California Supreme Court denied his Petition for Review. Doc. #6, Ex. I.

On September 9, 2009, Petitioner filed the instant federal Petition for a Writ of Habeas Corpus. Doc. #1. On October 1, 2009, the Court found that the Petition stated cognizable claims for relief and ordered Respondent to show cause why a writ of habeas corpus should not be granted. Doc. #2. Respondent has filed an Answer and Petitioner has filed a Traverse. Doc. ## 6 & 12.

II

The California Court of Appeal provided the following procedural background of the case as follows:

A jury convicted [Petitioner] of aggravated sexual assault on a child less than 14 years old and at least ten years younger than him. (Pen. Code, former § 269; Stats. 1994, 1st Ex. Sess. 1993-1994, ch. 48, § 1, p. 8761.) The underlying crime that formed the basis for the conviction under former section 269 was unlawful oral copulation. (§ 288a.) The jury also convicted [Petitioner] on two counts of lewd or lascivious acts on a child under 14, based, as charged in the information, on one incident that occurred in Santa Clara County and another in Los Angeles County. (§ 288, subd. (a).) [Petitioner] was acquitted on other charged counts. The trial court sentenced him to life in prison with a 23-year minimum term.

Doc. #6, Ex. G at 1-2, footnote omitted. The court then summarized the factual background of the case as follows:

I. Prosecution Case

In 1999, [Petitioner's] daughter was 12 years old. The prosecution presented evidence of three sexual molestation events that took place that year. The jury convicted [Petitioner] of one count for each of the three incidents.

A. The Garage Incident

[Petitioner's] 12-year-old daughter was a competitive table tennis player. She would practice in the family's garage. [Petitioner]

1 entered the garage and inserted a finger inside
2 her pants. He rubbed his finger on or near her
3 external genitalia and used it to enter her
4 vagina. This, the jury found, constituted lewd
5 or lascivious conduct on a child under 14 (§
6 288, subd. (a)).

7 B. The Van Incident

8 Later in 1999 [Petitioner's] daughter went to
9 Santa Monica so that she could participate in a
10 table tennis tournament. [Petitioner] and his
11 daughter were in the family's van. [Petitioner]
12 pulled down her pants and licked her external
13 genitalia. This too, the jury found,
14 constituted lewd or lascivious conduct on a
15 child under 14 (§ 288, subd. (a)).

16 C. The Bedroom Incident

17 Still later in 1999 [Petitioner] directed his
18 daughter to go with him to the parents' bedroom.
19 [Petitioner's] daughter told Sunnyvale police,
20 in a statement that the jury received as
21 evidence, "I remember he had me march - , like,
22 walk side-by-side with him" to the bedroom. "I
23 don't know why, like, really, step by step."
24 She confirmed that he escorted her in this
25 manner in her testimony, telling the jury "I
26 guess," which she explained in later testimony
27 was her way of saying "yes," that he had her
28 walk alongside him. Once in the bedroom, she
described in her statement to the Sunnyvale
police, "he made me take off my pants." Then
[Petitioner] "had me lie down on his bed, like
on the edge." There, as relevant to
[Petitioner's] convictions, he performed oral
copulation on her. The daughter told police "I
think I was probably scared" when this was
occurring; "I guess [I] kind of felt trapped,
'cause it was my father." Immediately after
this encounter ended "he told me that it was
supposed to be our secret, and not to tell Mom."
During this account, [Petitioner's] daughter
stated on occasion that her memory of events was
imperfect.

As relevant to the nonconsensual nature of this
incident, which was an essential element of
former [Penal Code] section 269, [Petitioner's]
daughter testified that her father was the
authority figure in the household. Her
boyfriend provided confirming testimony on this
point. Also, she told Sunnyvale police, in a
statement that the jury received as evidence,

1 that "you don't wanna, like, mess with him, so
2 you just stay low on the radar."

3 ...

4 D. Phone Call from Daughter to [Petitioner];
Statement to Police

5 The police arranged for [Petitioner's] daughter
6 to confront him in a phone call. Responding to
7 her accusations, [Petitioner] said that he was
8 aroused by her in 1999 and blamed her for
9 arousing him. He did not explicitly acknowledge
10 committing any particular act, but the
11 transcript suggests that he admitted engaging in
12 oral copulation with her and penetration with a
13 foreign object, namely his finger. The jury
14 heard a recording of the phone call.

15 The police interviewed [Petitioner], recording
16 the interview. He denied committing the acts
17 for which he was later tried and stated that his
18 daughter was trying to frame him. But he
19 admitted being sexually aroused by his daughter
20 in 1999, that he may have touched her in a
21 sexual manner, and that he had violated the law
22 "to some extent," though he retracted the latter
23 opinion later in the interview. He blamed his
24 daughter for arousing him, referring to "the way
25 she behaved, and the way she dressed," and
26 saying in broken English, "I think that she have
27 probably behaved uh, correctly, then nothing
28 would happen." He also said that his daughter
was rebellious and that they had fought for a
long time; he had even tried to force her to
leave the house.

...

II. Defense Case

[Petitioner] testified on his own behalf and
denied committing any charged or uncharged
molesting acts. He confirmed his statement to
police that his daughter was rebellious and
sometimes dishonest, and when she was 16 he
threatened to force her to leave the house.
[Petitioner] reacted to his daughter's phone
call with bafflement, wondering whether she had
an Electra complex - a daughter's libidinal
desire for her father - or was having an episode
of sexual paranoia. In speaking with police, he
meant to say that he did not have sexual
thoughts about his daughter during interactions
with her that were in question, because he never

1 did have any such thoughts, and his daughter
2 never sexually aroused him at age 12. The
3 recorded interview did not accurately convey his
4 intentions in answering certain questions during
5 the interrogation. And his answers to police
6 were the product of his bilingualism - he would
7 hear a question in English, think about it in
8 Vietnamese, and then render his spoken answer in
9 English - and his training as an engineer, which
10 led him to voice hypothetical possibilities in
11 order to think logically when questioned about
12 them.

13 Doc. #6, Ex. G at 2-5.

14 III

15 Under the Antiterrorism and Effective Death Penalty Act of
16 1996 ("AEDPA"), codified under 28 U.S.C. § 2254, a federal court may
17 not grant a writ of habeas corpus on any claim adjudicated on the
18 merits in state court unless the adjudication: "(1) resulted in a
19 decision that was contrary to, or involved an unreasonable
20 application of, clearly established federal law, as determined by
21 the Supreme Court of the United States; or (2) resulted in a
22 decision that was based on an unreasonable determination of the
23 facts in light of the evidence presented in the State court
24 proceeding." 28 U.S.C. § 2254(d).

25 "Under the 'contrary to' clause, a federal habeas court
26 may grant the writ if the state court arrives at a conclusion
27 opposite to that reached by [the Supreme] Court on a question of law
28 or if the state court decides a case differently than [the] Court
has on a set of materially indistinguishable facts." Williams
(Terry) v. Taylor, 529 U.S. 362, 412-13 (2000). "Under the
'unreasonable application' clause, a federal habeas court may grant
the writ if the state court identifies the correct governing legal

1 principle from [the] Court's decision but unreasonably applies that
2 principle to the facts of the prisoner's case." Id. at 413.

3 In four decisions this term alone, the United States
4 Supreme Court reaffirmed the heightened level of deference a federal
5 habeas court must give to state court decisions. See Harrington v.
6 Richter, 131 S. Ct. 770, 783-85 (2011); Premo v. Moore, 131 S. Ct.
7 733, 739-40 (2011); Felkner v. Jackson, 131 S. Ct. 1305, 1307-08
8 (2011) (per curiam); Cullen v. Pinholster, 131 S. Ct. 1388,
9 1398-1400 (2011). As the Court explained: "[o]n federal habeas
10 review, AEDPA 'imposes a highly deferential standard for evaluating
11 state-court rulings' and 'demands that state-court decisions be
12 given the benefit of the doubt.'" Felkner, 131 S. Ct. at 1307
13 (citation omitted).

14 IV

15
16 Petitioner seeks habeas relief under 28 U.S.C. § 2254
17 based on three claims: (1) Petitioner was denied due process as a
18 result of the trial court's failure to instruct the jury on all
19 elements of the charge in count one; (2) the trial court erred in
20 failing to instruct the jury on the lesser-included offense to count
21 one; and (3) Petitioner's due process rights were violated because
22 there was insufficient evidence to support his conviction.

23 A

24
25 Petitioner first claims that he was denied his right to
26 due process because the trial court failed to instruct the jury on
27 all elements of California Penal Code section 269, the charge in
28 count one. Specifically, Petitioner contends the court did not

1 instruct the jury that the act upon which the charge was based had
2 to have been performed "against the victim's will."

3 Petitioner was tried in 2007 for charged sexual acts
4 against his minor daughter that included two incidents of oral
5 copulation committed in 1999. Petitioner was charged in count one
6 with aggravated sexual assault of a child (Cal. Pen. Code § 269),
7 predicated on an underlying crime of unlawful oral copulation (Cal.
8 Pen. Code § 288a).

9 At the time the acts were committed, California Penal Code
10 section 269 stated, in relevant part:

11 (a) Any person who commits any of the following
12 acts upon a child who is under 14 years of age
13 and 10 or more years younger than the person is
14 guilty of aggravated sexual assault of a child:

15 . . .

16 (4) Oral copulation, in violation of Section
17 288a, when committed by force, violence, duress,
18 menace, or fear of immediate and unlawful bodily
19 injury on the victim or another person.

20 . . .

21 (b) Any person who violates this section is
22 guilty of a felony and shall be punished by
23 imprisonment in the state prison for 15 years to
24 life.

25 Cal. Pen. Code § 269 (West 1998). Oral copulation is defined under
26 California law as "the act of copulating the mouth of one person
27 with the sexual organ or anus of another person." Cal. Pen. Code §
28 288a. This definition applied in 1999.

 With regard to the sexual assault charge under Penal Code
section 269, the trial court orally instructed the jury as follows:

 [Petitioner] is charged in Count 1 with
aggravated sexual assault, oral copulation of a

1 child who was under the age of 14 years and at
2 least ten years younger than [Petitioner].

3 To prove [Petitioner] is guilty of this crime,
4 the People must prove that, one, [Petitioner]
5 committed an act of oral copulation with someone
6 else; two, when [Petitioner] acted, the other
7 person was under the age of 14 years and was at
8 least ten years younger than [Petitioner]; and
9 three, [Petitioner] accomplished the act by
10 force, violence, duress, menace, or fear of
11 immediate and unlawful bodily injury to anyone.

12 Oral copulation is any contact, no matter how
13 slight, between the mouth of one person and the
14 sexual organ or anus of another person.

15 Penetration is not required.

16 Consent is not a defense when the alleged victim
17 is a child.

18 An act is accomplished by force if a person uses
19 enough physical force to overcome the other
20 person's will.

21 Duress means a direct or implied threat of
22 force, violence, danger, hardship, or
23 retribution that causes a reasonable person to
24 do or submit to something that he or she would
25 not otherwise do or submit to.

26 When deciding whether the act was accomplished
27 by duress, consider all the circumstances
28 including the age of the other person and her
relationship to [Petitioner].

Menace means a threat, statement, or other act
showing an intent to injure someone.

An act is accomplished by fear if the other
person is actually and reasonably afraid or she
is actually and reasonably afraid and the
defendant knows of her fear and takes advantage
of it.

Doc. #6, Ex. B at 1852-53. The jury was provided with these
instructions in written form. See Doc. #6, Ex. A at 618-19.

In addressing Petitioner's claim that the jury was not
instructed on all elements of the offense, the appellate court found
no due process violation, stating:

[Petitioner] notes that the trial court's instruction omits the "against the victim's will" clause found in the current version of section 269 by reference to section 288a, subdivision (c)(2). But he offers no reason that the current version of section 269, rather than that in effect in 1999, should apply to him. Rather, it does not, at least to the extent it might lessen or ameliorate any punitive effect of the prior version of section 269. [Citations.] And there is no material difference between the prior and current versions of section 269 in any event. Section 288a, subdivision (c)(2), to which the current version of section 269 refers, provides that force, violence, duress, menace, or fear are the means by which a victim's will is overcome. If force, violence, duress, menace, or fear is present, then the victim's will is overcome as far as section 288a is concerned. The instruction told the jury it must find that [Petitioner] accomplished the oral copulation by "force, violence, duress, menace, or fear of immediate and unlawful bodily injury." The jurors found that one of these circumstances applied and therefore necessarily found, as required under the law applying to [Petitioner's] 1999 offense, and also under current law if that applied (which it does not), that his act was against his daughter's will.

Doc. #6, Ex. G at 8-9. The appellate court further found that "[t]he instruction restated the law accurately," Doc. #6, Ex. G at 7, a determination that is binding on this court, see Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam) (state court's interpretation of state law binds a federal court sitting in habeas corpus); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (same), and is one to which this Court must defer under AEDPA. Felkner, 131 S. Ct. at 1307-08. Petitioner therefore is not entitled to relief on this claim.

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B

Petitioner next claims that the trial court denied his right to due process when it refused his request to instruct the jury on nonforcible oral copulation of a minor child (Cal. Pen. Code § 288a(c)(1)) as a lesser-included offense of the aggravated sexual assault charged in count one. Petitioner has not, and, indeed, cannot, cite to any clearly established federal law, as determined by the United States Supreme Court, see 28 U.S.C. § 2254(d), to support his claim. The United States Supreme Court has held that a trial court must instruct on a lesser offense only where the case involved a capital offense. See Beck v. Alabama, 447 U.S. 625, 638 n.14 (1980). That is not the case here. As such, Petitioner fails to state a cognizable federal claim. See Solis v. Garcia, 219 F.3d 922, 929 (9th Cir. 2000) ("failure of a state court to instruct on a lesser offense [in a non-capital case] fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding"). This claim is dismissed.

C

Finally, Petitioner claims there was insufficient evidence to support his conviction of aggravated sexual assault on a minor. In particular, Petitioner contends that, because the victim was a willing participant, the duress element of the offense was not satisfied.¹

¹ Alternatively, Petitioner asserts that he should have been charged under the current version of the aggravated sexual assault statute (Cal. Pen. Code § 269), and that there is not sufficient evidence to sustain a conviction of that offense. As explained above, however, Petitioner lawfully was charged under the statute in effect at the time the crimes were committed.

1 The Due Process Clause "protects the accused against
2 conviction except upon proof beyond a reasonable doubt of every fact
3 necessary to constitute the crime with which he is charged." In re
4 Winship, 397 U.S. 358, 364 (1970). A federal court reviewing
5 collaterally a state court conviction does not determine whether it
6 is satisfied that the evidence established guilt beyond a reasonable
7 doubt. Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992). The
8 federal court "determines only whether, 'after viewing the evidence
9 in the light most favorable to the prosecution, any rational trier
10 of fact could have found the essential elements of the crime beyond
11 a reasonable doubt.'" See id. (quoting Jackson v. Virginia, 443
12 U.S. 307, 319 (1979)). Only if no rational trier of fact could have
13 found proof of guilt beyond a reasonable doubt may the writ be
14 granted. Jackson, 443 U.S. at 324.

15 Here, the state appellate court applied the standard of
16 review set forth in Jackson and rejected Petitioner's claim, finding
17 that "a rational trier of fact could have found the essential
18 elements of former section 269 beyond a reasonable doubt - i.e.,
19 that the oral copulation was aggravated by duress." See Doc. #6,
20 Ex. G at 7.

21 The court first determined that, in California, "there is
22 sufficient evidence of duress if the totality of the circumstances
23 supports an inference that the victim's participation was coerced in
24 a way that was more threatening than mere psychological pressure,
25 i.e., enticement, urging, or insistence." Doc. #6, Ex. G at 7.
26 Next, the court found that the record contained sufficient evidence
27 of duress:
28

1 This was 'a typical conservative Asian family,'
2 as [Petitioner's] daughter told the police in a
3 statement received in evidence. [Petitioner]
4 was the authority figure and his daughter was
5 only 12 years old. He escorted her to his
6 bedroom: she told police that 'he had me march'
7 'step by step.' She confirmed this aspect of
8 events preceding the sexual molestation in her
9 testimony. Once in the bedroom, she told
10 police, [Petitioner] 'made me take off my pants'
11 and 'had me lie down on his bed.' 'I think I
12 was probably scared' when this was occurring,
13 she said; 'I guess [I] kind of felt trapped,
14 'cause it was my father.' Immediately after
15 this encounter ended 'he told me that it was
16 supposed to be our secret, and not to tell Mom.'
17 Finally, the jury could, in considering the
18 facts, take into account from common knowledge
19 that a 12-year-old girl 'of ordinary
20 susceptibilities' would not wish to be orally
21 copulated by her father and would find the
22 experience disgusting and shameful, and that
23 [Petitioner's] daughter found it to be so given
24 that, being 'kinda depressed' and having 'a
25 tendency just to cry at night' in later years,
26 as she told police, she chose to try to exorcise
27 [sic] the demon by reporting the incident to
28 authorities, making public an experience that
she could have put behind her if it had not
continued to torment her psychologically.

Id. (citation omitted).

Here, the state appellate court properly applied the
Jackson standard to the facts of Petitioner's case. Under AEDPA's
heightened level of deference, this Court cannot say that the state
appellate court's determination that there was sufficient evidence
to support the conviction on the aggravated sexual assault charge
"(1) resulted in a decision that was contrary to, or involved an
unreasonable application of, clearly established federal law, as
determined by the Supreme Court of the United States; or (2)
resulted in a decision that was based on an unreasonable
determination of the facts in light of the evidence presented in the
State court proceeding." 28 U.S.C. § 2254(d); Felkner, 131 S. Ct.

1 at 1307-08; Williams, 529 U.S. at 409; Jackson, 443 U.S. at 324.
2 Petitioner is not entitled to federal habeas relief on this claim.

4 V

5 For the foregoing reasons, the Petition for a Writ of
6 Habeas Corpus is DENIED.

7 Further, a Certificate of Appealability is DENIED. See
8 Rule 11(a) of the Rules Governing Section 2254 Cases. Petitioner
9 has not made "a substantial showing of the denial of a
10 constitutional right." 28 U.S.C. § 2253(c)(2). Nor has Petitioner
11 demonstrated that "reasonable jurists would find the district
12 court's assessment of the constitutional claims debatable or wrong."
13 Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner may not
14 appeal the denial of a Certificate of Appealability in this Court
15 but may seek a certificate from the Court of Appeals under Rule 22
16 of the Federal Rules of Appellate Procedure. See Rule 11(a) of the
17 Rules Governing Section 2254 Cases.

18 The Clerk is directed to enter Judgment in favor of
19 Respondent and against Petitioner, terminate any pending motions as
20 moot and close the file.

21 IT IS SO ORDERED.

22
23 DATED 05/16/2011



THELTON E. HENDERSON
United States District Judge

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